

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

HARMONY M.M. NASON,	)	
	)	CASE NO. C10-1492-JLR
Plaintiff,	)	
	)	
v.	)	REPORT AND RECOMMENDATION
	)	RE: SOCIAL SECURITY DISABILITY
MICHAEL J. ASTRUE, Commissioner	)	APPEAL
of Social Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff Harmony Nason proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be REMANDED for further administrative proceedings.

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**FACTS AND PROCEDURAL HISTORY**

Plaintiff was born on XXXX, 1975.<sup>1</sup> Her educational level is not entirely clear. (*See*, e.g., AR 164 (plaintiff indicated she completed one year of college) and AR 245 (plaintiff indicated she dropped out of high school and put herself through vocational school for computers).) She previously worked in data entry/customer service. (AR 160).

Plaintiff filed applications for DIB and SSI in August 2006, alleging disability beginning December 31, 2003 due to depression, anxiety, mood disorder, polycystic ovarian syndrome, and chronic pain. (AR 139-46, 158.) Her date last insured for DIB is December 31, 2008. (AR 49.) Plaintiff's applications were denied at the initial level and on reconsideration, and she timely requested a hearing.

ALJ Verrell Dethloff held a hearing on May 8, 2009, taking testimony from plaintiff. (AR 10-39.) On June 26, 2009, the ALJ issued a decision finding plaintiff not disabled. (AR 47-57.)

Plaintiff timely appealed. The Appeals Council, on July 15, 2010, denied plaintiff's request for review (AR 1-4), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

**JURISDICTION**

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

**DISCUSSION**

The Commissioner follows a five-step sequential evaluation process for determining

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<sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it  
02 must be determined whether the claimant is gainfully employed. The ALJ found that plaintiff  
03 had not engaged in substantial gainful activity since December 31, 2003, the alleged onset date.

04 At step two, it must be determined whether a claimant suffers from a severe impairment.  
05 The ALJ found plaintiff's pelvic strain severe.

06 Step three asks whether a claimant's impairments meet or equal a listed impairment.  
07 The ALJ concluded plaintiff did not have an impairment or combination of impairments that  
08 met or medically equaled a listing.

09 If a claimant's impairments do not meet or equal a listing, the Commissioner must  
10 assess residual functional capacity (RFC) and determine at step four whether the claimant has  
11 demonstrated an inability to perform past relevant work. The ALJ assessed plaintiff as able to  
12 perform the full range of light work. (AR 54.) With this RFC, the ALJ found plaintiff able to  
13 perform her past relevant work as a data entry/customer service representative.

14 If a claimant demonstrates an inability to perform past relevant work, the burden shifts  
15 to the Commissioner to demonstrate at step five that the claimant retains the capacity to make  
16 an adjustment to work that exists in significant levels in the national economy. Finding  
17 plaintiff not disabled at step four, the ALJ did not proceed to step five.

18 This Court's review of the ALJ's decision is limited to whether the decision is in  
19 accordance with the law and the findings supported by substantial evidence in the record as a  
20 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means  
21 more than a scintilla, but less than a preponderance; it means such relevant evidence as a  
22 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881

01 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which  
02 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278  
03 F.3d 947, 954 (9th Cir. 2002).

04 Plaintiff argues that the ALJ failed to properly identify all of her severe impairments and  
05 to consider all of her functional limitations, failed to properly evaluate the medical evidence,  
06 erred in assessing her credibility, improperly determined her RFC, and erroneously found she  
07 could perform her past relevant work.<sup>2</sup> She also argues that the Appeals Council erred in  
08 failing to remand her claim for a new hearing based on new evidence. Plaintiff requests  
09 remand for an award of benefits or, in the alternative, remand for further administrative  
10 proceedings before a different ALJ. The Commissioner argues that the ALJ's decision is  
11 supported by substantial evidence and should be affirmed.

#### 12 Severe Impairments and Functional Limitations

13 At step two, a claimant must make a threshold showing that her medically determinable  
14 impairments significantly limit her ability to perform basic work activities. *See Bowen v.*  
15 *Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. §§ 404.1520(c), 416.920(c). "Basic work  
16 activities" refers to "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§  
17 404.1521(b), 416.921(b). "An impairment or combination of impairments can be found 'not  
18 severe' only if the evidence establishes a slight abnormality that has 'no more than a minimal  
19 effect on an individual's ability to work.'" *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir.

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21 <sup>2</sup> Plaintiff's Opening Brief contains a lengthy Statement of Facts. The parties are reminded  
22 that such a recitation is unnecessary and, in fact, is discouraged. Rather, a discussion of the relevant  
facts and portions of the administrative record should be conducted in the context of specific  
assignments of error.

1996) (quoting Social Security Ruling (SSR) 85-28). “[T]he step two inquiry is a de minimis screening device to dispose of groundless claims.” *Id.* (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also required to consider the “combined effect” of an individual’s impairments in considering severity. *Id.* Also, the ALJ must thereafter consider the limiting effects of all of plaintiff’s impairments, including those that are not severe, in determining RFC. §§ 404.1545(e), 416.945(e); SSR 96-8p.

As stated above, the ALJ in this case found only a pelvic disorder to be severe. He stated that chronic pain syndrome is not a medically determinable impairment (AR 51 n.1 and 52) and found plaintiff’s mental impairments not severe (AR 51-54).

Plaintiff argues that the ALJ failed to identify all of her impairments at step two, including post-traumatic stress disorder (PTSD), major depressive disorder, chronic pain syndrome, bilateral pudendal nerve neuralgia, and myofascial pain. She further argues that the ALJ’s failure to consider all of those impairments at subsequent steps in the sequential evaluation constituted reversible error. *Smolen*, 80 F.3d at 1290 (“Having found Smolen to suffer from only one ‘severe’ impairment at step two, the ALJ necessarily failed to consider at step five how the combination of her other impairments - and resulting incapacitating fatigue - affected her residual functional capacity to perform work.”)

The Commissioner argues that the ALJ properly considered plaintiff’s functional limitations based on his evaluation of the medical record and her credibility. He maintains that any error at step two, even in finding chronic pain syndrome to be not medically determinable, was harmless. *See Stout v. Commissioner, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006) (recognizing application of harmless error in Social Security context where a “mistake

01 was nonprejudicial to the claimant or irrelevant to the ALJ's ultimate disability conclusion.”)

02 In response, plaintiff maintains the ALJ's incorrect presumption as to chronic pain  
03 tainted the entire analysis of her claim and that, as required by *Stout* for a finding of harmless  
04 error, it cannot be said that no reasonable ALJ could have reached a different disability  
05 determination in the absence of this error. *Id.* at 1056. Plaintiff notes, in particular, the fact  
06 that examining physician Dr. John Shelton, whose opinions the ALJ gave “greater weight” (AR  
07 53), diagnosed her with a “[p]ain disorder associated with psychological factors.” (AR 297.)  
08 For the reasons described below, the Court agrees that the ALJ's findings at step two were  
09 insufficient and implicated the remainder of the decision.

10 A. Chronic Pain

11 The ALJ's discussion of the medical evidence reflects that plaintiff sought treatment for  
12 chronic pain in as early as 2003. (*See* AR 49.) For instance, in December 2003, Dr.  
13 Deborah Nalty began plaintiff on medication to treat symptoms of anxiety and chronic pain  
14 (AR 366), and later, in July 2005, assessed plaintiff with chronic pain syndrome. (AR 368.)  
15 (*See also, e.g.*, AR 229 (a physical therapist assessed “pelvic pain of uncertain etiology with  
16 pelvic muscle hypertonicity, decreased strength and sensation”).) As noted by the ALJ, the  
17 record contains evidence of generally benign examination findings and an absence of acute  
18 distress on examination. (AR 50-51.) However, it also, as described in detail below, contains  
19 a number of medical opinions and other evidence relevant to plaintiff's complaints of pain from  
20 both a physical and psychological perspective.

21 In assessing the opinions of the medical providers, the ALJ rejected chronic pain  
22 syndrome as a “medically determinable impairment”:

01 A notation of Chronic Pain Syndrome is merely the designation provided by the  
02 practitioners [sic] in question for the pain alleged. Chronic pain syndrome  
03 means only that there are complaints of pain. **Caenen v. Secretary of Health  
04 and Human Services**, 722 F. Supp. 629, 631 (D. Nev., 1989). This diagnosis  
05 does not equate to disability under the Social Security Act. *See, generally,*  
06 **Young v. Heckler**, 803 F.2d 963, 968 (9 Cir., 1986); *Compare, Beecher v.*  
07 **Heckler**, 756 F.2d 693, 695-96 N.2 (9 Cir., 1985). Because Chronic Pain  
Syndrome is neither a mental disease (compare, Somatization Disorder,  
Diagnostic and Statistical Manual of Mental Disorders, 300.81, Pain Disorder  
307.80 (4th. ed., 1994 American Psychiatric Ass’n), nor a physical disease, it is  
not a medically determinable impairment for purposes of analyzing credibility;  
that is, it cannot provide a predicate for the regulatory requirement of an  
impairment that could reasonably be expected to cause the pain alleged.

08 (AR 51, n.1.) The ALJ’s conclusion on this point led, at least in part, to his rejection of various  
09 medical providers’ opinions. (*See supra* and AR 51-54.)

10 Plaintiff challenges the ALJ’s finding with respect to chronic pain disorder as contrary  
11 to law. She points to section 12.07 of the Listing of Impairments describing Somatoform  
12 disorders, defined as “[p]hysical symptoms for which there are no demonstrable organic  
13 findings or known physiological mechanisms[,]” 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.07.  
14 She also points to the three subtypes of pain disorder recognized in the Diagnostic and  
15 Statistical Manual of Mental Disorders (DSM-IV-TR) – pain disorder associated with  
16 psychological factors (307.80); pain disorder associated with both psychological factors and a  
17 general medical condition (307.89); and pain disorder associated with a general medical  
18 condition – only the latter of which is not considered a mental disorder and is used to facilitate  
19 differential diagnosis. DSM-IV-TR 499 (4th ed. 2000).

20 The ALJ’s finding with respect to chronic pain syndrome/disorder appears to lack both  
21 medical and legal support. The DSM-IV-TR recognizes two subtypes of pain disorder as  
22 mental disorders. *Id.* Moreover, Ninth Circuit case law recognizes the existence of

01 pain-based impairments having “both a physical and psychological component.” *Lester v.*  
02 *Chater*, 81 F.3d 821, 829-30 (9th Cir. 1996) (discussing a claimant’s “acute pain”, deemed  
03 “chronic pain syndrome” by a medical adviser) (citing *Bunnell v. Sullivan*, 947 F.2d 341, 347  
04 (9th Cir. 1991) (en banc) (recognizing that pain is “a completely subjective phenomenon” and  
05 that the Commissioner must consider all available evidence in assessing complaints of pain)).  
06 *See also Young v. Heckler*, 803 F.2d 963, 968 (9th Cir. 1986) (stating physician’s report was  
07 “not conclusive on the issue of the extent to which appellant suffered from chronic pain  
08 syndrome on a psychophysiologic basis[,]” and that, while it suggested the diagnosis, “it is not  
09 at all clear from the report that appellant suffers from disabling levels of lower back pain.”) As  
10 stated in *Lester*: “Pain merges into and becomes a part of the mental and psychological  
11 responses that produce the functional impairments. The components are not neatly separable.”  
12 *Id.* In that case, the Ninth Circuit found that, because the consequences of the claimant’s  
13 physical and mental impairments were “so inextricably linked,” the Commissioner was  
14 required to “consider whether the[] impairments taken together result[ed] in limitations equal in  
15 severity to those specified by the listings.” *Id.* Here, while the ALJ correctly stated that a  
16 diagnosis alone is not sufficient to establish a severe impairment, the Court finds no support for  
17 the conclusion that chronic pain syndrome is not a medically determinable impairment.

18 The ALJ’s finding with respect to chronic pain cannot be deemed “nonprejudicial to the  
19 claimant or irrelevant to the ALJ’s ultimate disability conclusion[]” and, therefore, harmless.  
20 *Stout*, 454 F.3d at 1055. A failure to list an impairment as severe at step two can be deemed  
21 harmless where associated limitations are considered at step four. *Lewis v. Astrue*, 498 F.3d  
22 909, 911 (9th Cir. 2007). In this case, there is nothing in the ALJ’s RFC assessment indicating



01 consideration of pain-related limitations at step four. (AR 54 (finding plaintiff capable of  
02 performing the full range of light work).) In fact, given the ALJ's finding at step two, his  
03 assessment of the medical opinions related to pain, and the assessment of plaintiff's credibility,  
04 it would appear that he did not consider pain as a factor relevant to the step four finding. As  
05 argued by plaintiff, the ALJ's chronic pain finding at step two tainted the remainder of the  
06 analysis and necessitates a remand of this case.

07 B. Other Impairments

08 The Commissioner does not directly respond to plaintiff's step two argument as it  
09 relates to other impairments. He, instead, argues generally that the ALJ properly evaluated the  
10 medical record and plaintiff's credibility in assessing functional limitations. The  
11 Commissioner does, however, concede that, contrary to the ALJ's finding, one physician  
12 identified a number of observations to support a PTSD diagnosis. (Dkt. 14 at 13 (citing AR  
13 350).)

14 As reflected below, the ALJ's assessment of the medical record was insufficient in a  
15 number of respects, including evidence associated with PTSD, depressive disorder, bilateral  
16 pudendal nerve neuralgia, and myofascial pain. Also, the ALJ's error in relation to chronic  
17 pain may have implicated his consideration of plaintiff's other impairments. Accordingly, the  
18 ALJ should also reconsider the severity of these other impairments on remand.

19 Medical Opinions

20 In evaluating the weight to be given to the opinions of medical providers, Social  
21 Security regulations distinguish between "acceptable medical sources" and "other sources."  
22 Acceptable medical sources include, for example, licensed physicians and psychologists, while

01 other non-specified medical providers are considered “other sources.” 20 C.F.R. §§  
02 404.1513(a) and (e), 416.913(a) and (e), and SSR 06-03p.

03 In general, more weight should be given to the opinion of a treating physician than to a  
04 non-treating physician, and more weight to the opinion of an examining physician than to a  
05 non-examining physician. *Lester*, 81 F.3d at 830. Where not contradicted by another  
06 physician, a treating or examining physician’s opinion may be rejected only for “‘clear and  
07 convincing’” reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)).  
08 Where contradicted, a treating or examining physician’s opinion may not be rejected without  
09 “‘specific and legitimate reasons’ supported by substantial evidence in the record for so doing.”  
10 *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

11 The ALJ may reject physicians’ opinions “by setting out a detailed and thorough  
12 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and  
13 making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*,  
14 881 F.2d at 751). Rather than merely stating his conclusions, the ALJ “must set forth his own  
15 interpretations and explain why they, rather than the doctors’, are correct.” *Id.* (citing *Embrey*  
16 *v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

17 Less weight may be assigned to the opinions of other sources. *Gomez v. Chater*, 74  
18 F.3d 967, 970 (9th Cir. 1996). However, “[s]ince there is a requirement to consider all relevant  
19 evidence in an individual’s case record,” the ALJ’s decision “should reflect the consideration of  
20 opinions from medical sources who are not ‘acceptable medical sources’ and from  
21 ‘non-medical sources’ who have seen the claimant in their professional capacity.” SSR  
22 06-03p. “[T]he adjudicator generally should explain the weight given to opinions from these

01 ‘other sources,’ or otherwise ensure that the discussion of the evidence in the determination or  
02 decision allows a claimant or subsequent reviewer to follow the adjudicator’s reasoning, when  
03 such opinions may have an effect on the outcome of the case.” *Id.* See also *Smolen*, 80 F.3d at  
04 1288-89 (ALJ must provide germane reasons as to lay testimony).

05 A. Drs. Geordie Knapp, Lee Gustafson, and John Shelton

06 Examining physician Dr. Geordie Knapp diagnosed plaintiff with mood disorder due to  
07 undetermined health problems, and rule out amnestic disorder in April 2006. (AR 246.) She  
08 found moderate, marked, and severe limitations in plaintiff’s abilities to perform basic work  
09 tasks, and deemed her seriously disturbed. (AR 247-48.) The report reflected Dr. Knapp’s  
10 consideration of plaintiff’s reports of pain. (See AR 246 (associated depressed mood with  
11 pain) and AR 247 (stating, in relation to cognitive limitations: “Daily routine dependent on  
12 level of pain.”)) The ALJ gave these opinions “little weight” as her “diagnosis of mood disorder  
13 is predicated on the claimant’s pain complaints[]” which the ALJ found lacking in credibility.  
14 (AR 51-52.)

15 In April 2009, examining physician Dr. Lee Gustafson diagnosed PTSD and dysthymic  
16 disorder, and possible pain disorder associated with psychological and physical condition.  
17 (AR 347.) He assessed a number of moderate and marked functional limitations due to, *inter*  
18 *alia*, chronic pain, severe anxiety, and severe mistrust, and deemed plaintiff seriously disturbed.  
19 (AR 348-49.) On an accompanying narrative evaluation, Dr. Gustafson assessed chronic  
20 PTSD and chronic pain secondary to medical condition, and described plaintiff as, *inter alia*,  
21 extremely guarded, tense, mistrustful, anxious, constricted, and suspicious, and wrote: “She  
22 has a chronic medical condition that results in chronic pain.” (AR 350.) The ALJ assessed

01 Dr. Gustafson's opinions as follows:

02 Dr. Gustafson's opinion is accorded little evidentiary weight, as he did not  
03 document symptoms to support the diagnosis of PTSD. Chronic pain is not a  
04 medically determinable mental impairment. The claimant's allegations lack  
credibility, as discussed below. To the extent Dr. Gustafson relied on her  
subjective complaints, his opinion is further discounted.

05 (AR 52.)

06 The ALJ gave "greater weight" to the April 2006 opinions of examining physician Dr.  
07 John Shelton. (AR 53.) Dr. Shelton diagnosed plaintiff with major depression, single  
08 episode, related to both psychological and medical issues, and pain disorder associated with  
09 psychological factors, and assessed a Global Assessment of Functioning (GAF) of 50,  
10 indicating serious symptoms or any serious impairment in functioning. *See* DSM-IV-TR 34.

11 As described by the ALJ:

12 The claimant reported difficulty with concentration and memory loss. She  
13 reported that she stopped working in part due to pelvic pain. She also reported  
14 symptoms of anxiety and depression. She had an upcoming court case  
involving domestic abuse/sexual assault. She was in counseling at Compass  
Health.

15 On mental status examination, the claimant's content of thought was good. She  
16 had no difficulty remembering 3/3 objects after five minutes. She was able to  
spell the word "world" forward and backwards. She was also able to complete  
17 serial 7s without error. Her results on the WMS-III were in the average range.  
The diagnoses included major depression, single episode, related to both  
18 psychological and medical issues, and pain disorder associated with  
psychological factors. Dr. Shelton commented that the claimant was **"funny,  
upbeat and had no trouble providing easy banter to her interactions with  
me. She appears bright."** He stated, "It is clear that she is under a great deal  
19 of duress currently because of the domestic violence/sexual abuse difficulty  
which confronts her **she is certainly not disabled by her anxiety or  
20 depression. Nor is she disabled by her memory difficulties. This woman  
21 is capable of working from a psychological perspective"**.

22 (AR 52; emphasis in original; internal citation omitted.)

01 The ALJ also considered Dr. Shelton's opinions in assessing plaintiff's functional  
02 limitations, noting Dr. Shelton's report that plaintiff "was captivating, funny, upbeat and  
03 bright[]" and had no difficulty with social interaction, as well as her performance in testing.  
04 (AR 53.) He observed that Dr. Shelton "conducted a more comprehensive evaluation,  
05 including administration of the WMS-III," and his provision of "a detailed report to support his  
06 conclusion that the claimant was capable of working from a psychological perspective." (AR  
07 53-54.) Additionally, the ALJ took note of evidence from a State agency psychological  
08 consultant, Dr. Cynthia Collingwood, who diagnosed major depressive disorder due to  
09 psychological and medical issues and pain disorder associated with psychological issues, but  
10 deemed plaintiff's mental impairments not severe and resulting in only mild limitations. (AR  
11 304-16.)

12 The Court finds the ALJ's assessment problematic in several respects. First, the ALJ's  
13 step two error in relation to chronic pain clearly impacted his consideration of the opinions of  
14 Drs. Knapp and Gustafson. Second, as conceded by the Commissioner, Dr. Gustafson did  
15 describe symptoms supporting the PTSD diagnosis, such as rapid and pressured speech,  
16 appearing extremely guarded, reluctant to share information, anxious, tense, mistrustful, and  
17 constricted, and reports of chronic insomnia and occasional nightmares. (AR 350.) *See also*  
18 DSM-IV-TR 463-68 (describing PTSD symptoms). Third, while Dr. Shelton did conduct a  
19 more thorough mental status evaluation and ultimately concluded plaintiff was not disabled and  
20 was capable of working, it is worth noting that both Dr. Shelton and Dr. Collingwood  
21 diagnosed plaintiff with a pain disorder associated with psychological issues, that Dr. Shelton  
22 assessed a GAF of 50, and that opinions as to disability and ability to work are reserved to the

Commissioner and, therefore, not “entitled to controlling weight or special significance.” SSR 96-5p. Given all of the above, the Court concludes that the ALJ insufficiently assessed the opinions of Drs. Knapp and Gustafson and that those opinions should be reconsidered on remand.

B. Compass Health

The ALJ described plaintiff’s treatment at Compass Health as follows:

Treatment notes show complaints of depression and anxiety. In August 2006, the claimant reported to Berry Thompson, MS, symptoms of depression and difficulty with sleeping. The claimant reported that she was a victim of assault. On mental status examination, the claimant was depressed, anxious, and fearful. Ms. Thompson assessed major depressive disorder, moderate. She assigned a **Global Assessment of Functioning score of 55**. In March 2007, Carol Ashley, MA, assigned a Global Assessment of Functioning of 50. In June 2007, the claimant reported to Ms. Ashley that her anxiety was up because she had to be out of the house she was living in by that day. The claimant stated that she was going to go to the library to spend some time and relax. In June 2008, the claimant reported to June Norberg, BA, she had to be thankful she could function through her depression and anxiety. She reported that she was in a “weird funk” but her coping skills helped. In August 2008, the claimant reported to Ms. Norberg that she was considering going to school in the fall. She reported she needed to overcome her anxiety in order to do that. She reported that she wanted to attend a group at Compass Health in the fall.

(AR 52-53; emphasis in original; internal citations omitted.) The ALJ concluded that the Compass Health treatment notes did not alter the finding that plaintiff did not have severe mental impairments, explaining: “The records do not contain assessments provided by acceptable medical sources and in general do not include objective findings such as mental status exams. The claimant was slated for dialectical behavior therapy but reported in April 2009 that she did not want to do it.” (AR 54; citation to record omitted.)

As observed by plaintiff, the record contains other reports from Compass Health. In

01 September 2006, Carol Ashley diagnosed plaintiff with PTSD and major depressive disorder  
02 and rated her GAF at 50, indicating serious symptoms. (AR 496.) Ashley wrote that plaintiff  
03 was “having recurrent intrusive thoughts associated with recent traumatic event[s,]” and  
04 “recurring irrational fears & episodes of flashbacks as well as avoidant behavior of situational  
05 triggers.” (AR 496.) Ashley also, in the March 2007 report described by the ALJ and in an  
06 April 2008 report, repeated the PTSD and major depressive disorder diagnoses. (AR 272, 504  
07 (describing plaintiff’s mental health symptoms as causing moderate impairments)<sup>3</sup> and AR 402  
08 (“She has worked on reducing her anxiety level associated with PTSD but due to the number of  
09 transitions she has experienced in the last couple of years this has been hard for her to do by her  
10 report.”))

11 As “other sources,” the ALJ was required only to discuss and provide understandable  
12 and germane reasoning in his assessment of the Compass Health providers’ opinions. Here,  
13 the ALJ appropriately afforded their opinions less weight than those of acceptable medical  
14 sources and pointed to the general absence of objective findings.

15 However, it is not entirely clear whether the ALJ considered all of the records from  
16 these providers, such as the additional records from Ashley described above. The ALJ also  
17 took the April 2009 comment regarding dialectical behavior therapy (DBT) out of context.  
18 The records reveal that plaintiff reported a change in counselor was not working out and, as a  
19 result, that she “[n]ow” did not “even want to do D.B.T. (group).” (AR 370.) The provider  
20 indicated his intention to discuss a clinician and possibly a site change. (*Id.*) As noted by

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21  
22 <sup>3</sup> Plaintiff identifies this report as coming from Thompson (Dkt. 13 at 16), while the ALJ  
associates it with Ashley (AR 52). Although included on a report by Thompson, initials on the form  
appear to reflect that Ashley modified Thompson’s report in March 2007. (*See* AR 272, 504.)

01 plaintiff, she testified in May 2009 as to her continued participation in DBT. (AR 15-16.)  
02 Finally, the ALJ's error at step two and errors in the assessment of other physicians' opinions  
03 may well have impacted the assessment of the records from Compass Health. As such, the  
04 ALJ should reassess the opinions of the Compass Health providers on remand.

05 C. Drs. Gordon Irving, Evangeline Erskine, and Timothy Timmons

06 The ALJ described the records from Drs. Evangeline Erskine and Timothy Timmons,  
07 both with Sea Mar Community Health Center, as follows:

08 The claimant established care at Sea Mar Community Health Center in February  
09 2009. She was interested in a referral to the University of Washington Pain  
10 clinic and was "very frustrated with her care to date." She complained of pain  
11 from the waist down, primarily on the left side. She stated "she doesn't want us  
12 to get any of her old records because they are of no value and she has gotten no  
13 help in the past." Based on the claimant's reported history, she was assessed  
with chronic pain syndrome. On follow-up the claimant referred to black mold  
exposure. She stated she did not want to talk about symptoms with doctors  
"because she feels dismissed." She required referral for a pain clinic and to  
naturopathy. The claimant was described as well developed, well nourished  
and **in no acute distress**. The provider agreed to make the requested referrals.

14 (AR 50-51; citation and footnote omitted.) It was within this discussion that the ALJ included  
15 his finding with respect to chronic pain syndrome, excerpted above. (*Id.* at 51, n.1.) The ALJ  
16 thereafter described findings from Dr. Gordon Irving:

17 In March 2009, Dr. Gordon A. Irving, MD, of Swedish Medical Center Pain  
18 Management Services saw the claimant for a consultation. The claimant  
19 reported symptoms of pelvic pain, bilateral pudendal nerve neuralgia and back  
20 pain. On a scale of 0 to 10, the pain was 10 in interfering with sleep, general  
21 activity, mood, walking ability, work, relations with others, and enjoyment of  
22 life. The claimant reported no pain modulators. She reported having two  
sessions of pelvic floor physical therapy but "did not think this was going to be  
of benefit and did not go further." She had had no other treatments. The  
claimant reported that she lived for 6 and half years in a condominium which  
had black mold. She reported that she began to develop pain around 2001.



01 Dr. Irving noted that the claimant's workup, such as CT scans, ultrasounds,  
02 blood work and brain MRI were normal. On examination, the claimant was in  
03 **no acute distress**. She did not want the doctor to examine her abdomen or  
04 touch the skin or the legs. She was oriented, with normal recent and remote  
05 memory, and normal mood and affect. **Her physical examination findings  
were generally normal, including straight leg raise to 90 degrees, and full  
range of motion in the bilateral hips.** She had low back tenderness. Dr.  
Irving had no treatment plan other than to continue with counseling, and to  
discuss medications with the primary care provider.

06 (AR 51; internal citations omitted; emphasis in original.)

07 As averred by the Commissioner, there is nothing in Dr. Irving's report necessarily  
08 inconsistent with the ALJ's RFC assessment. Also, while plaintiff asserts that Dr. Irving  
09 opined that the effect on her function and quality of life was "[s]ignificant[.]" this appears to  
10 reflect plaintiff's report, rather than Dr. Irving's opinion. (See AR 343.) However, for the  
11 reasons described below, the ALJ should reconsider all of these medical opinions on remand.

12 Dr. Irving assessed differential diagnoses of bilateral pudendal nerve neuralgia and  
13 myofascial pain. (AR 343-45.) Dr. Erskine, who saw plaintiff twice in one month, diagnosed  
14 her with chronic pain syndrome. (AR 335, 338.) Dr. Timmons diagnosed her with chronic  
15 pain syndrome and possible bilateral pudendal nerve neuralgia. (AR 332-33.) As stated  
16 above, diagnoses, standing alone, do not establish severe impairments. Also, it should be  
17 noted that these records do not contain any opinions as to associated limitations.

18 Yet, critically, the ALJ appeared to explicitly reject the evidence from Drs. Erskine and  
19 Timmons based on the erroneous conclusion that chronic pain syndrome does not constitute a  
20 medically determinable impairment. Also, as averred by plaintiff, the records from all three of  
21 these physicians arguably provide support for the possibility that plaintiff had one or more  
22 medical conditions that could reasonably be expected to cause pain. For these reasons, the

01 ALJ should reconsider these opinions on remand.

02 Credibility

03 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to  
04 reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001).  
05 *See also Thomas*, 278 F.3d at 958-59. In finding a social security claimant's testimony  
06 unreliable, an ALJ must render a credibility determination with sufficiently specific findings,  
07 supported by substantial evidence. "General findings are insufficient; rather, the ALJ must  
08 identify what testimony is not credible and what evidence undermines the claimant's  
09 complaints." *Lester*, 81 F.3d at 834. "We require the ALJ to build an accurate and logical  
10 bridge from the evidence to her conclusions so that we may afford the claimant meaningful  
11 review of the SSA's ultimate findings." *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003).  
12 "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness,  
13 inconsistencies either in his testimony or between his testimony and his conduct, his daily  
14 activities, his work record, and testimony from physicians and third parties concerning the  
15 nature, severity, and effect of the symptoms of which he complains." *Light v. Social Sec.*  
16 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

17 The ALJ in this case found plaintiff's statements concerning the intensity, persistence,  
18 and limiting effects of her symptoms not credible to the extent inconsistent with the RFC  
19 assessment, providing the following reasoning:

20 The claimant's failure to seek treatment undercuts her allegations of disabling  
21 pelvic pain. For example, in March 2009, Dr. Irving noted the claimant had  
22 two sessions of pelvic floor physical therapy but "did not think this was going to  
be of benefit and did not go further. She has had no other treatments". The  
claimant is repeatedly described as being in no acute distress. Her pain

01 complaints have not been consistent. For example, in February 2009 she  
02 reported that she had symptoms for three years, from the waist down primarily  
03 on the left side of her body. In contrast, she reported to the Social Security  
04 Administration that she had first been bothered by her condition in 2001 and  
05 became unable to work because of the condition in 2003. The claimant's  
06 allegations of lower extremity numbness are not confirmed by objective  
07 examination findings. She has failed to cooperate with her physicians, for  
08 example by refusing to be examined, or refusing to provide details of her  
09 symptoms, or failing to follow up with recommended evaluations. The  
10 claimant told Dr. Irving that she was homebound because of pain, that it was  
11 very difficult doing activities of daily living, and that on a scale of 1-10 the pain  
12 was a 10, interfering with basically everything. In contrast, the claimant told a  
13 therapist at Compass Health that she had a fear of going out because of worrying  
14 about who she would run into and that this was related to "not knowing what to  
15 say".

09 With regard to the claimant's alleged memory and concentration problems,  
10 objective testing does not support those allegations. On a mental status  
11 examination with Dr. Shelton, she had no difficulty remembering 3/3 objects  
12 after five minutes. She was able to spell the word "world" forward and  
13 backwards. She was also able to complete serial 7s without error. She  
14 attained average scores on the WMS-III. The claimant's representative  
15 attempted to discount Dr. Shelton's report, arguing that it was difficult to be put  
16 in a situation where one needed to be open with a stranger. That argument has  
17 little weight, as the claimant bears the burden of establishing disability. More  
18 to the point, Dr. Shelton's assessment is based on objective findings, including  
19 his observations of the claimant, mental status examination findings and the  
20 results of the WMS-III.

16 As for the opinion evidence, in determining the physical residual functional  
17 capacity, the undersigned considered a December 2005 report by Matt Davies,  
18 MD, who noted that the claimant was under his care for generalized malaise and  
19 cognitive dysfunction. He opined that the claimant was unable to participate in  
20 employment at that time. That opinion is given little weight, as there is no  
21 evidence of a cognitive disorder, and "generalized malaise" is not a medically  
22 determinable impairment. Opinions may properly be disregarded where no  
clinical or laboratory findings are furnished by the physician to support the  
opinion(s) tendered. **Bayliss v. Commissioner, Social Security  
Administration**, 427 F.3d 1211 (9th Cir. 2005); **Connett v. Barnhart**, 340  
F.3d 871, 875 (9th Cir., 2003) (holding that the ALJ properly rejected a treating  
physician's testimony in favor of an examining physician's statements because  
the treating physician's "extensive conclusions regarding [claimant's]  
limitations are not supported by his own treatment notes"); **Tonapetyan v.**

01 **Halter**, 242 F.3d 1144, 1148 (9th Cir. 2001). I accord no weight to this  
02 opinion. And I have no duty to recontact the doctor for clarification of  
03 conclusory pronouncements. **Younger v. Heckler**, 803 F.2d 963, 968 (9 Cir.  
04 1986) (per curiam) (“In light of the conclusionary nature of Dr. Collins’ March  
26, 1981 report, it was appellant’s responsibility to produce evidence either  
confirming Dr. Collins’ report or reviewing appellant’s condition subsequent to  
March 26, 1981.”)

05 In April 2007 Dr. Hoskins, the State agency medical consultant, affirmed a  
06 finding that the claimant could perform the full range of light work. The  
07 comments on the residual functional capacity form point to the normal  
08 examination findings and the claimant’s lack of follow up with specialty  
referrals. The undersigned concurs and adopts Dr. Hoskins’ opinion that the  
claimant retains the functional capacity for light work.

09 (AR 55-56; internal citations to record omitted.)

10 The ALJ provided clear and convincing reasons for finding plaintiff not credible,  
11 including the failure to seek or follow through with treatment, *Tommasetti v. Astrue*, 533 F.3d  
12 1035, 1039 (9th Cir. 2008), the existence of contradictory medical evidence, *Carmickle v.*  
13 *Comm’r of SSA*, 533 F.3d 1155, 1161 (9th Cir. 2008), an absence of corroborating objective  
14 findings, *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); SSR 96-7p, and various  
15 inconsistencies in the record, *Light*, 119 F.3d at 792. While plaintiff identifies a number of  
16 minor issues, particularly in relation to the ALJ’s comparison of various pieces of evidence, she  
17 does not establish that the ALJ’s interpretation of the evidence was unreasonable. Also, even  
18 if one or more of those comparisons could be faulted, any error could be deemed harmless in  
19 light of the remaining valid reasons for the credibility assessment. *Carmickle*, 533 F.3d at  
20 1162-63.

21 However, as reflected above, the ALJ erroneously concluded that plaintiff’s chronic  
22 pain syndrome could not serve as a medically determinable impairment for purposes of

01 assessing credibility. (AR 51, n.1.) This error, as well as errors in the consideration of the  
02 medical evidence, necessitates reconsideration of plaintiff's credibility on remand.

03 Step Four

04 At step four, the ALJ must identify plaintiff's functional limitations or restrictions, and  
05 assess work-related abilities on a function-by-function basis, including a narrative discussion.  
06 See 20 C.F.R. §§ 404.1545, 416.945; SSR 96-8p. RFC is the most a claimant can do  
07 considering limitations or restrictions. See SSR 96-8p. The ALJ must consider the limiting  
08 effects of all of plaintiff's impairments, including those that are not severe, in determining RFC.  
09 §§ 404.1545(e), 416.945(e); SSR 96-8p. Here, the errors discussed above necessitate  
10 reconsideration of the subsequent steps in the sequential evaluation, including assessment of  
11 plaintiff's RFC and the determination of whether she can perform her past relevant work.

12 Appeals Council Evidence

13 Plaintiff argues that the Appeals Council erred in failing to remand her claims for a new  
14 hearing in light of new evidence from Susan Chewing, LICSW, MHP. Chewing, in a July  
15 2010 Mental RFC Assessment, diagnosed plaintiff with PTSD and major depression, rule out  
16 obsessive/compulsive personality, and assessed her as markedly and severely impaired in a  
17 number of functional areas. (AR 511-15.) She requests that the Court find the Appeals  
18 Council's failure to remand to be legal error.

19 Evidence submitted to the Appeals Council becomes part of the administrative record  
20 for the purposes of this Court's review. See *Harman v. Apfel*, 211 F.3d 1172, 1180-81 (9th  
21 Cir. 2000); *Gomez v. Chater*, 74 F.3d 967, 971 (9th Cir. 1996); *Ramirez v. Shalala*, 8 F.3d 1449,  
22 1451-52 (9th Cir. 1993). The Court reviews such evidence pursuant to "sentence four" of 42

01 U.S.C. § 405(g): “The court shall have power to enter, upon the pleadings and transcript of the  
 02 record, a judgment affirming, modifying, or reversing the decision of the Commissioner of  
 03 Social Security, with or without remanding the cause for a rehearing.” The Court, therefore,  
 04 determines whether there is substantial evidence to support the ALJ’s decision even taking the  
 05 evidence submitted to the Appeals Council into consideration.<sup>4</sup>

06 In this case, there are other reasons supporting remand of this matter. The ALJ should  
 07 also, therefore, consider the evidence from Chewing in reassessing plaintiff’s claims.

#### 08 Remand

09 The Court has discretion to remand for further proceedings or to award benefits. *See*  
 10 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of  
 11 benefits where “the record has been fully developed and further administrative proceedings  
 12 would serve no useful purpose.” *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir.  
 13 2002).

14 Such a circumstance arises when: (1) the ALJ has failed to provide legally  
 15 sufficient reasons for rejecting the claimant’s evidence; (2) there are no  
 16 outstanding issues that must be resolved before a determination of disability can  
 be made; and (3) it is clear from the record that the ALJ would be required to  
 find the claimant disabled if he considered the claimant’s evidence.

17 *Id.* at 1076-77. *See also Varney v. Secretary of Health & Human Servs.*, 859 F.2d 1396, 1401

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18 4 The Commissioner avers that, because it is not the final agency action, the decision from the  
 19 Appeals Council is not itself subject to judicial review. However, the Ninth Circuit has clearly  
 20 assumed jurisdiction to review a denial of review from the Appeals Council. *See Ramirez*, 8 F.3d at  
 1454-55 (finding that the Appeals Council erred in failing to find that the plaintiff met the requirements  
 21 of a listing). While this Court may not be bound by such an assumption, *see, e.g., Sorenson v. Mink*,  
 239 F.3d 1140, 1149 (9th Cir. 2001) (“[U]nstated assumptions on non-litigated issues are not  
 22 precedential holdings binding future decisions.”); *Estate of Magnin v. Commissioner*, 184 F.3d 1074,  
 1077 (9th Cir. 1999) (“When a case assumes a point without discussion, the case does not bind future  
 panels.”), the Commissioner fails to identify any binding precedential authority upon which this Court  
 could rely to support his position.

01 (9th Cir. 1988) (“In cases where there are no outstanding issues that must be resolved before a  
02 proper disability determination can be made, and where it is clear from the administrative  
03 record that the ALJ would be required to award benefits if the claimant’s excess pain testimony  
04 were credited, we will not remand solely to allow the ALJ to make specific findings regarding  
05 that testimony.”)

06       The ALJ in this case did fail to provide legally sufficient reasons for rejecting plaintiff’s  
07 evidence. That evidence includes opinions from examining physicians Drs. Knapp and  
08 Gustafson assessing, *inter alia*, marked and severe limitations, and deeming plaintiff seriously  
09 disturbed. “Where the Commissioner fails to provide adequate reasons for rejecting the  
10 opinion of a treating or examining physician, [the Court credits] that opinion as ‘a matter of  
11 law.’” *Lester*, 81 F.3d at 830-34 (finding that, if doctors’ opinions and plaintiff’s testimony  
12 were credited as true, plaintiff’s condition met a listing) (quoting *Hammock v. Bowen*, 879 F.2d  
13 498, 502 (9th Cir. 1989)). Crediting an opinion as a matter of law is appropriate when, taking  
14 that opinion as true, the evidence supports a finding of disability. *See, e.g., Schneider v.*  
15 *Commissioner of Social Sec. Admin.*, 223 F.3d 968, 976 (9th Cir. 2000) (“When the lay  
16 evidence that the ALJ rejected is given the effect required by the federal regulations, it becomes  
17 clear that the severity of [plaintiff’s] functional limitations is sufficient to meet or equal [a  
18 listing.]”); *Smolen*, 80 F.3d at 1292 (ALJ’s reasoning for rejecting subjective symptom  
19 testimony, physicians’ opinions, and lay testimony legally insufficient; finding record fully  
20 developed and disability finding clearly required).

21       However, the Court does not find remand for an award of benefits appropriate in this  
22 case. *See Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding for further

01 determinations where there were insufficient findings as to whether plaintiff's testimony should  
02 be credited as true). While the limitations assessed by Drs. Knapp and Gustafson may well  
03 eliminate all potential jobs at step five, the ALJ never proceeded to that step in this case. Also,  
04 considering the record as a whole, it cannot be said that there are no outstanding issues to be  
05 resolved or that it is clear the ALJ would be required to find plaintiff disabled. The record  
06 contains contrary evidence from examining and reviewing physicians and a number of valid  
07 reasons for the credibility assessment. Reconsideration of this case, starting with proper  
08 consideration of plaintiff's chronic pain and including the consultation of a medical expert,  
09 would serve a useful purpose.

10 At the same time, the Court agrees with plaintiff's request for the assignment of a  
11 different ALJ on remand. The ALJ has "'a special duty to fully and fairly develop the record  
12 and to assure that the claimant's interests are considered.'" *Widmark v. Barnhart*, 454 F.3d  
13 1063, 1068 (9th Cir. 2006) (quoted source omitted). With consideration of that duty in mind,  
14 the Commissioner should assign plaintiff's case to a different ALJ on remand. *See* Hearings,  
15 Appeals and Litigation Law Manual 1-2-12-55(d)(11) ("Appeals Council remands, including  
16 those generated by the courts, are assigned to the same ALJ who issued the decision or  
17 dismissal unless: (a) the case was previously assigned to that ALJ on a prior remand from the  
18 Appeals Council and the ALJ's decision or dismissal after remand is the subject of the new  
19 Appeals Council remand, or (b) the Appeals Council or the court directs that the case be  
20 assigned to a different ALJ.")

21 ///

22 ///



**CONCLUSION**

For the reasons set forth above, this matter should be REMANDED to a different ALJ for further administrative proceedings.

DATED this 19th day of April, 2010.



Mary Alice Theiler  
United States Magistrate Judge